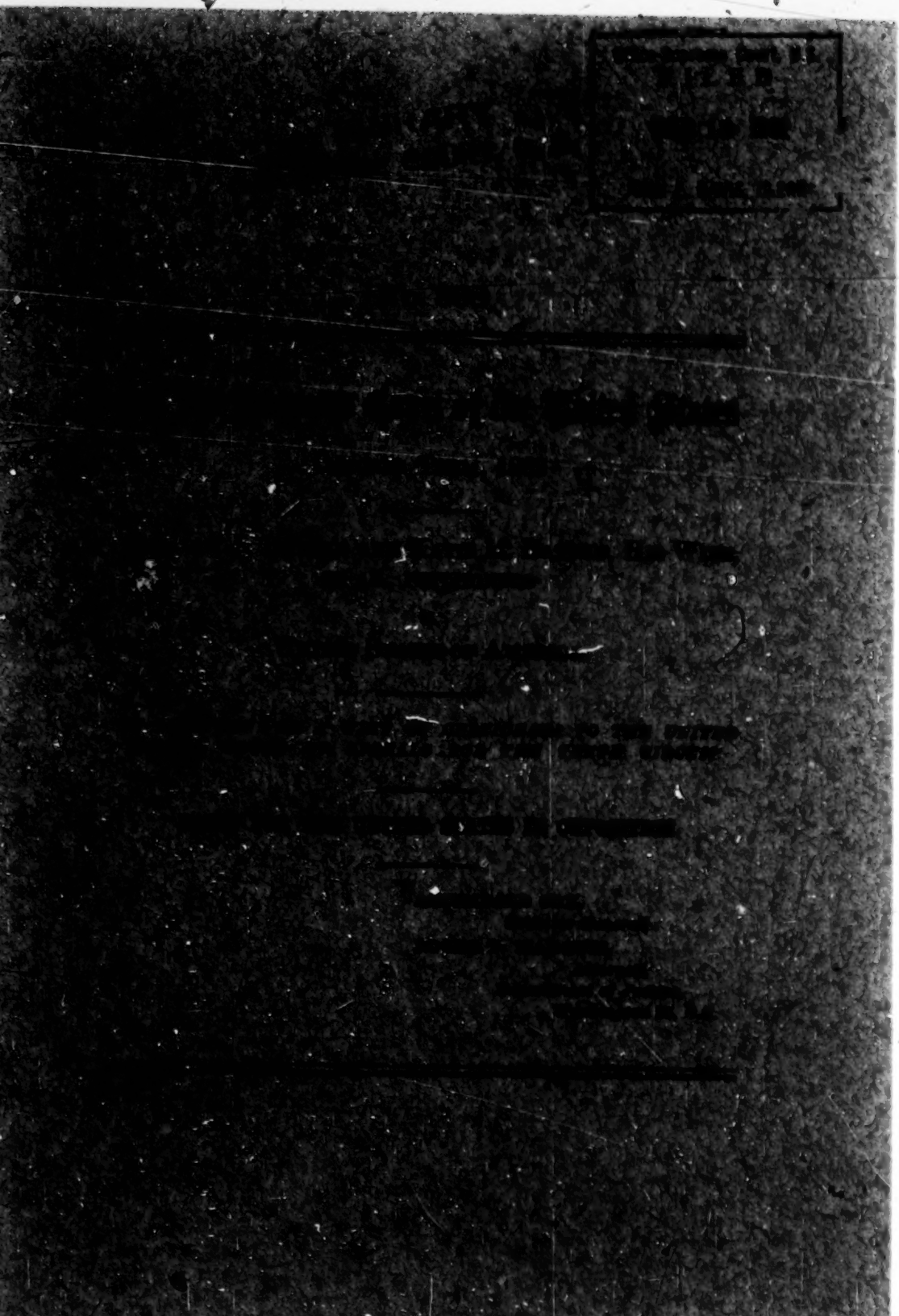

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 568

WILLIAM J. BATTEN AND KATIE M. BATTEN, HIS WIFE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 27–37) are reported at 306 F. 2d 580. Its opinion at an earlier phase of the case (Pet. App. 19–20) is reported at 292 F. 2d 144. The district court's original opinion (Pet. App. 16–18) and its opinion on remand (App., *infra*, pp. 9–10)[1] are not reported.

[1] While petitioners print the findings of fact and conclusions of law after remand (Pet. App. 21–26), they omit the opinion filed therewith.

JURISDICTION

The judgment of the court of appeals was entered July 10, 1962 (Pet. App. 38). A timely petition for rehearing was denied on August 9, 1962 (Pet. App. 38–39), and the petition for certiorari was filed on November 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether noise and vibration caused by the authorized use of a United States Air Force Base for national defense purposes constituted a taking of property under the Fifth Amendment, and thus gave rise to a claim for just compensation, where the activities complained of took place from 2,000 feet to one and one-half miles from complainants' nearest property, and where there was no physical invasion of that property.

STATEMENT

In July 1959, the owners of 14 properties located in the vicinity of Forbes Air Force Base near Topeka, Kansas, brought suit under the Tucker Act seeking recovery of stated amounts, each less than $10,000. The case was tried before Senior Circuit Judge Huxman, who, after hearing the evidence, dismissed the case on the basis of the allegations of the complaint. On appeal, the United States moved for remand to determine the actual facts. The remand was ordered and the following facts found:

Forbes Air Force Base (originally known as Topeka Army Air Field), a temporary World War II training field, was deactivated after the war. In 1948,

a residential subdivision in which plaintiffs now reside was laid out north of the base, and houses were built mostly in 1949 and 1950, and none after September 1955. This settlement, known as Pauline, Kansas, is bounded on the west by a heavily traveled four-lane highway, immediately west of which is the main line of the Atchison, Topeka and Santa Fe Railroad (Pet. App. 21).

After the Korean War, the United States acquired a tract north of the base, and adjoining the Pauline addition on its eastern boundary, with a view to enlarging it to accommodate jet aircraft. A runway for that purpose was put into operation in September 1955, and a ramp and warm-up pad constructed. The parking ramp is closest to Pauline, with the warm-up pad and runway to the east of the ramp (Pet. App. 21–22). The western edge of the ramp and parking area is approximately 650 feet from the nearest of plaintiffs' homes on Lake Drive, the ramp itself being 900 feet wide (Pet. App. 22). In 1956, maintenance activity was conducted on the ramp 3,420 feet from plaintiffs' property. Since May 1960, this operation has been removed to a place approximately one and one-half miles from plaintiffs' property (Pet. App. 24).

Since September 1955, about 100 RB–47 and B–47 six-engine jet aircraft have been located at the base. Typically, the planes warm up at a point 2,000 feet, and take off from a point 2,280 feet, from plaintiffs' nearest property (Pet. App. 22). In general, the government neither claims nor exercises any right to fly planes over petitioners' property, since Pauline

lies outside the flight pattern of all aircraft operating from the base (though on a few occasions planes did fly directly over plaintiffs' homes at low altitude) (Pet. App. 23). The flights do, however, cause noises and vibrations on petitioners' properties, rattling windows and dishes, drowning out conversations and television, and interrupting sleep (Pet. App. 24). In addition, the use of an injection system for take-offs during the summer months occasionally causes smoke to be blown across the properties, leaving an oily black deposit on houses, windows, and laundry (Pet. App. 25). The sounds emitted by the jet operations are heard generally throughout the area surrounding the base, not merely on plaintiffs' property, and the effect of the sound waves and smoke upon the Pauline Subdivision is of the same character as that experienced in varying degrees in the general vicinity of the base. However, because of the proximity of plaintiffs' property to the operations, the effects are much greater upon them than upon other property farther removed (Pet. App. 25). The court made specific findings as to the depreciation in value of each property, the amount in most instances being about 50 percent (Pet. App. 26).[2]

[2] The United States was unable to appeal from the findings as to damage since judgment was entered in its favor. It is our view, however, that undue emphasis was given to the alleged undesirability of the property as a residence for some of petitioners and insufficient attention paid to the objective market value test. Evidential rulings precluded proof of the fact that proximity to jet airports enhances, rather than decreases, the value of property for nonresidential purposes, and may have very little depressing effect even upon residential values, as property owners gradually become more accustomed to the new sounds.

In its original opinion, the district court had concluded that under *United States* v. *Causby*, 328 U.S. 256, there must be an intrusion into the airspace over a plaintiff's property in order to constitute a taking. It reaffirmed this view upon remand, stating that the "case of *Richards* v. *Washington Terminal Company*, 233 U.S. 546, is very much in point upon the facts" (App., *infra*, p. 9).

In affirmance, the court of appeals emphasized the distinction under the Federal Constitution (in contrast to the constitutions or statutes of 25 states) between a taking and consequential damages (Pet. App. 30–31), and concluded there was no taking absent an invasion of property. It also noted that the various activities took place 2,000 feet to 1½ miles from the nearest property of the plaintiffs and that *Causby* contained nothing indicating recovery could be had for noise, vibration, or smoke coming from distances of this magnitude (Pet. App. 33). Finally, it found that the activities to which petitioners objected were not specifically directed against them or their property, did not arrogate to the government any of petitioners' dominion over their property, and presented a situation common to all private property surrounding the base (Pet. App. 34).

ARGUMENT

1. We agree that the jet airplane, along with other noisy engines such as rockets, large tractor-trailers, *etc.*, have become a source of considerable annoyance. But the application of constitutional principles in this field is, we believe, clear. The basic rule is that "damage alone gives courts no power to require com-

pensation," *United States* v. *Willow River Co.*, 324 U.S. 499, 510, and that damages "which are the incidental result of lawful governmental action, without any direct invasion of private property, are consequential; they do not constitute a taking under the Fifth Amendment." *Nunnally* v. *United States*, 239 F. 2d 521, 524 (C.A. 4). The fact that the disturbing influence in this case is jet aircraft on government property, rather than practice bombs or the host of other situations involving federal activities which may annoy neighboring property owners, is no ground for allowing recovery.[3] If the result were otherwise, the sole prerequisite to recovery would be substantial damage, and the fundamental constitutional distinction between taking and damage would be obliterated.

2. *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, is not in conflict with the decision below, as petitioners suggest, but strongly supports it, as the district court recognized (Appendix, *infra*, pp. 9–10). There, plaintiff was denied recovery for annoyances (noises, vibrations, emission of smoke and sparks from locomotives) incidental to the normal operation of a railroad near plaintiff's property, and experienced generally by property owners in the vicinity. Recovery was permitted only for those damages caused

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[3] The lower federal courts which have passed on the question are unanimous in rejecting claims based on noise and vibration where there were no overflights. *Moore* v. *United States*, 185 F. Supp. 399 (N.D. Tex.); *Pope* v. *United States*, 173 F. Supp. 36 (N.D. Tex.); *Freeman* v. *United States*, 167 F. Supp. 541 (W.D. Okla.); *United States* v. *26.07 Acres of Land*, 126 F. Supp. 374 (E.D. N.Y.).

by smoke and gases directed specifically at plaintiff's property by an exhaust fan installed in the railroad tunnel. Nothing comparable occurs here. Both courts below found that the disturbing flight activities created a condition common to all properties surrounding the airfield, and were not specifically directed at petitioners.

United States v. *Causby*, 328 U.S. 256, upon which the district court relied, is entirely consistent with the decision below. There, this Court held that damages resulting from continuous low-altitude flights in the airspace immediately above the landowner's property were not "merely consequential," but were "the product of a direct invasion of respondents' domain", and reiterated the rule that "it is the character of the invasion, not the amount of damage resulting from it * * * that determines the question whether it is a taking" (328 U.S. at 265, 266). The Court of Claims has subsequently held that flights above the 500-foot level would not be actionable under *Causby*. *Matson* v. *United States*, 171 F. Supp. 283 (per Mr. Justice Reed). And if vertical shock waves travelling more than 500 feet do not give rise to a direct invasion, it can scarcely be urged that horizontal waves emanating from a source 2,000 feet to 1½ miles from petitioners' property would do so.

CONCLUSION

Since the decision below is plainly correct and is not in conflict with any other decision, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
Attorney.

DECEMBER 1962.

APPENDIX

Opinion of District Court on Remand

The court adopts as a part of its opinion, the opinion it filed at the time it sustained the Government's motion to dismiss the complaint for failure to state a cause of action. Not much need be said in addition to what was said in that opinion. The conclusion is inescapable to the court that the philosophy of *United States* v. *Causby*, 328 U.S. 256, is that before there is a taking by the Government, there must be some form of entry upon the property of a complainant. Noises and sound vibrations originating outside the boundaries of plaintiffs' property and transmitted across the property do not constitute a taking. The holding of the court in the *Causby* case is summed up in syllabus (d), as follows:

> Flights of aircraft over private land which are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land are as much an appropriation of the use of the land as a more conventional entry upon it.

While there was an occasional flight over plaintiffs' property in this case, it was accidental and not as a result of a claimed right. Plaintiffs do not rely for recovery upon such occasional flights. They rely entirely upon the sound waves and smoke originating outside the confines of their property.

The case of *Richards* v. *Washington Terminal Company*, 233 U.S., 546, is very much in point upon the facts. There, property owners whose land adjoined a railroad line were denied recovery for damages

resulting from the noise, vibrations, smoke and the like, incidental to the operation of the railroad. Recovery there, as here, was sought on the ground that these things constituted a taking under the power of eminent domain enjoyed by the railroad company. In the *Causby* case, the Supreme Court referred to and apparently approved the *Richards* case by distinguishing it from the *Causby* case.

It is conceded that no recovery can be had because of the tort or nuisance, and that recovery must be had on the sole theory that the acts complained of constituted a taking of an interest in plaintiffs' property for which compensation must be paid.

The court is unable to find there was such a taking.

/s/ WALTER A. HUXMAN,
Judge, Assigned.

Filed Oct. 23, 1961.

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